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IN THE

Supreme Court of the United States

October Term, 1979

In re:

Multi-Piece Rim Products Liability Litigation.

THE FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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Questions Presented.

1. Is an order denying a motion to disqualify counsel a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (See Point I, *infra*).

2. In sanctioning the simultaneous representation by attorney Risjord of both the plaintiffs and the insurer of defendant Firestone, over Firestone's objections, did the court below err by permitting a patent and potentially recurring form of conflict, requiring corrective action by the exercise of this Court's supervisory jurisdiction? (See Point II, *infra*).

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Opinions Below.

The "opinion" of United States District Judge William R. Colinson (Western District of Missouri) on Firestone's Motion to Disqualify Attorney John C. Risjord and the Risjord firm (being a portion of the Second Pretrial Order)[1] is unreported and appears at page A. 157 of the Appendix. The opinion of the Court of Appeals is reported at 612 F.2d 377 and reproduced at page A. 200 of the Appendix. The judgment as entered showing the date of entry appears at page A. 204 of the Appendix.[2]

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 7, 1980 (A. 204). The petition for a writ of certiorari was filed on March 13, 1980; certiorari was granted on May 12, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]The order in question was included as a discrete order in the United States District Court's Second Pretrial Order (A. 157 at A. 165).

[2]We shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Appendix references (designated A. . . .) are to the pages of the printed single Appendix.

The Court (by its order of June 23, 1980) has granted leave to supplement the record but no page references to the additional materials (annexed to Risjord's Motion of June 9, 1980) are presently available; hence, such matters (cited only at page 4, note 7 of this Brief) are merely designated Supp. Record.

Statute Involved.

United States Code, Title 28 §1291.

> "*Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement of the Case.

This proceeding involves a motion to disqualify counsel arising in the context of multi-district proceedings. Jurisdiction of the court of first instance (the United States District Court for the Western District of Missouri) in the multi-district proceedings ultimately rests on diversity grounds. 28 U.S.C. §1332(a).

John C. Risjord and the Risjord firm are attorneys for certain plaintiffs (the Risjord Plaintiffs)[3] who have sued Firestone, seeking damages for personal injuries[4] (A. 12,

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[3]The Risjord Plaintiffs to whom reference is made are: Joe Willie Butler (*Butler* case); Bobby Craig Goodwin, Carolyn Marie Goodwin, Melissa Darlene Goodwin, Kathy Diane Goodwin, and their mother Edna Goodwin Perkins (*Goodwin* case); and Rene, Luciano and Delphina Rodriguez (*Rodriguez* case) (A. 12, 50, 62). Risjord also represents the plaintiffs in a fourth rim case (*Hale*), arising out of an occurrence in October, 1977, as to which Home does not afford coverage (A. 28). Because of the obvious interrelationship of the four Risjord cases (the complaints generally follow the same format), Risjord's actions in *Hale* must inevitably be colored by his approach in *Butler*, *Goodwin*, and *Rodriguez*. Accordingly, Firestone believes that in order to avoid the appearance of impropriety Risjord should be disqualified in *Hale* as well, even apart from the possibility that Risjord's strategy in *Hale* might itself be motivated by a desire to aid Home's position in other cases.

[4]The suits of the Risjord Plaintiffs are part of multi/district litigation involving a number of personal injury actions which have been brought against various manufacturers of multi-piece rims or components thereof, including Firestone. Risjord serves as lead and liaison counsel for all of the plaintiffs in the multi-district litigation (A. 81).

50, 62). Risjord and the Risjord firm also have a long-standing relationship as attorneys for The Home Insurance Company, which insures Firestone against the claims of the Risjord Plaintiffs (A. 111, 134, 157-158). The Risjord-Home relationship extends over a period of some twenty years, during which Risjord and the Risjord firm have represented Home in a number of matters[5] and consistently held Home out to the public as their foremost insurance client[6] (A. 90-91, 98-99, 100-102, 105-106).[7]

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[5]In his deposition, Risjord at one point testified as follows:

> "Q How long has your firm represented the Home Insurance Company?
>
> "A The Home Insurance Company, my understanding, was a fire insurance company. We represented the Home Insurance Company—Fire Insurance Company—periodically, probably as long as I have practiced law." (A. 90-91).

The trial court found that Home employed the Risjord firm "from time to time on a case-by-case basis." (A. 157-158).

The Risjord Firm's representation of Home is, of course, imputed to Risjord. See Disciplinary Rule (DR) 5-105(D):

> "If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment."

[6]During the 20 years Home has been a client of the Risjord Firm, Home consistently has been listed *first* among the Risjord Firm's insurance clients (in a non-alphabetical listing) in the Martindale-Hubbell Law Directory (A. 90, 100-102, 105-106). The entry (A. 100-102) printed as Addendum A to this Brief (following page 45) is illustrative. Risjord claimed he had suggested that the list be alphabetized. But he acknowledged that he had received proofs of the list (A. 96) and being aware that a non-alphabetical listing was employed, apparently did not seek to alter Home's preeminent position in that list.

[7]At the time of the trial court's order denying Firestone's motion to disqualify, Risjord and his firm were counsel of record for Home in one such case (involving a first party claim under a policy of fire insurance) entitled *Cannova Enterprises, Inc. etc. v. Home Insurance Company, et al.*, then pending in the Western District of Missouri (A. 98). Pending Firestone's appeal, Home purported to discharge Risjord in *Cannova* (A. 190). Since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. For present purposes, we merely note that in light of the deeply rooted relationship between Risjord and Home, the mere disposition of a single case (*i.e., Cannova*) cannot be viewed as a matter of great moment. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978). Nor would Risjord be unaware that his firm's potential future business with

(footnote continued on following page)

In framing his complaints against Firestone, Risjord included a highly unusual theory of "intentional tort", whereupon his client Home served "reservation of rights" letters upon Firestone, disclaiming coverage for such "intentional tort" claims under its liability Policy (A. 12, 50, 62, 113, 115).[8]

Firestone thereupon moved to disqualify Risjord[9] and the Risjord firm, citing the conflict posed by Risjord's *simultaneous* relationship[10] to both Home and the Risjord Plain-

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its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts to defeat coverage vis-a-vis Firestone.

Risjord now advises that the *Cannova* case has been dismissed (Supp. Record). But that dismissal likewise is not a matter of great moment here, given the real gravamen of the conflict complained of.

Nor may Risjord properly take comfort from his recent self-serving disclaimer (Supp. Record) as to other pending cases. That disclaimer (even if true) is fully consistent with an ongoing relationship between Risjord and Home, having in mind Risjord's testimony that his firm has represented Home periodically over a twenty-year span and that a brief gap in specific assignments (conveniently coinciding with the pending disqualification proceedings) does not really negate the impact of the overall Home-Risjord relationship. See *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978).

[8]The role of Risjord in espousing an "intentional tort" theory is demonstrated in the *Rodriguez* case, in which the original Complaint (filed by counsel other than Risjord) did not proceed on an intentional tort theory, whereas the Second Amended Complaint (filed by Risjord) does proceed on such a theory (A. 6, 12), in light of which Home has served a disclaimer in that case also (A. 197, 198).

[9]Firestone sought to disqualify Risjord and the Risjord firm from further representing plaintiffs (*e.g.*, the Risjord Plaintiffs) in multi-piece rim cases against Firestone in which Home insures Firestone. Firestone likewise sought to disqualify Risjord and his firm in rim cases in which information obtained from Home could be useful to plaintiffs. (A. 104).

[10]Where, as here, the attorney's dual role is current and simultaneous, the focal point is the duty of undivided loyalty and need for independent judgment, as opposed to the question of preserving confidences (and related issue of subject matter nexus) which is stressed where a former client is involved. See, *e.g.*, *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978).

tiffs (A. 104). In essence, Firestone contended that the temptation which Risjord inevitably confronts to further the interests of his valued, long-standing client Home, in developing a strategy against Firestone, creates an inherently improper situation, not only in the context of Home's fiduciary obligation to its insured but also in terms of Risjord's duty of loyalty (and independent judgment) to the Risjord Plaintiffs, who should and must be represented by counsel untainted by the differing interests of another client.

The trial court, while finding that Risjord's position was likely to have an adverse effect on the exercise of his independent judgment[11], nevertheless authorized Risjord to continue despite Firestone's objection provided he secured the consent of Home and the Risjord Plaintiffs[12], which consents Risjord purported to obtain (A. 160, 165-166, 167).

Firestone thereupon appealed (A. 184) relying upon the Eighth Circuit's recent holding in *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977) expressly authorizing an appeal from an order denying disqualification, and upon several other recent cases in which the Eighth Circuit had permitted such appeals. (See, *e.g.*, *Meat Price Investigators Association v. Spencer Foods, Inc.*, 572 F.2d 163, 164-165 (8th Cir. 1978); *Central Milk Products Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 990 (8th Cir. 1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380

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[11]The trial court stated: ". . . this Court, like the court in *IBM v. Levin, supra* 'think[s] . . . that it *is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result* from the adversary posture towards that client in another legal matter.' *IBM v. Levin, supra* at 280." (Emphasis added). (A. 160).

[12]Absent such consent, Risjord was directed to terminate his representation of either Home "or the plaintiffs in any suit against Firestone." (A. 165-166).

(8th Cir. 1979).) Without even setting the matter for oral argument, the appellate court, *en banc*, rendered an opinion in which it overruled this entire line of cases, and held that such orders were not appealable (A. 201-202).

After devoting its primary attention to that question, the Court of Appeals, almost by way of a footnote, acknowledged that it should consider the merits of the case before it. Without any meaningful discussion of the facts or the law, the appellate court (devoting but a single sentence to the matter) purported to uphold the trial court's action as not involving an abuse of discretion (A. 203).[13]

Summary of Argument.

I.

Orders denying disqualification generally, and certainly the order denying Firestone's motion in the instant proceedings, should be deemed appealable under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Nor is there any valid reason for distinguishing such orders from those granting disqualification, the appealability of which appears to be generally conceded. Although the circuits are divided on

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[13]Consistent with the "case or controversy" requirement of Article III of the Constitution, the Court of Appeals' ruling of non-appealability (upon which it predicated the overruling of its prior cases) necessarily precluded it from giving meaningful consideration to the merits of the present case. See, *e.g.*, *Desist v. United States*, 394 U.S. 244, 254-255 note 24 (1969); *Stovall v. Denno*, 388 U.S. 293, 301 (1967). Moreover, as a practical matter the court's determination of non-appealability necessarily foreclosed the court from reversing the trial court, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future. Nor is it conceivable that absent such considerations the appellate court would have disposed in so casual a fashion of substantive issues which the trial court itself found to be substantial and appeal-worthy (A. 160, 166).

the question, upon analysis the view here urged is consistent with the *Cohen* criteria and with the dictates of logic and sound policy.

Certainly the *Cohen* elements of separability and finality are satisfied here. So, too, is the urgency factor cited in *Cohen*. And insofar as the importance of the order may be a relevant consideration, that factor likewise militates in favor of appealability.

Viewing the question of appealability in terms of urgency, there are compelling reasons for permitting immediate review rather than deferring review until an appeal is taken from the ultimate judgment on the merits. Apart from the obvious waste in expending time and effort on proceedings which were tainted from the outset, there are subtler but no less serious irreparable injuries to be considered in the context of the underlying conflicts which give rise to such proceedings. Thus the course of the proceeding may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty. Likewise irreparable will be the effect of such a tainted proceeding in frustrating public policy and in its impact upon the public's perception of the administration of justice. Nor is it a real answer to these concerns to suggest that the aggrieved party resort to the vagaries of the All-Writs Statute (28 U.S.C. §1651) or the uncertain prospects of a possible permissive appeal under 28 U.S.C. §1292(b). Indeed, the continued vitality of *Cohen* itself attests to this Court's recognition that the parties ought not to be relegated to such dubious alternatives where the *Cohen* rationale comes into play. Finally, deferral of appeal to final judgment on the merits would not really aid the appellate court in determining the extent to which the taint complained of has affected the proceedings, as that impact cannot readily be quantified at any stage of the proceedings.

Turning to the question of "importance," and consistent with the pragmatism which the subject doctrine properly requires, while an order may be deemed important because its making resolves a question of broad impact, one also may view a given class of orders as important because of their impact upon the losing parties, or because they are addressed to questions rooted in same significant public policy, or on both accounts. The order here in question qualifies as important by all of these standards. The precise issue posed—*i.e.*, the need to apply a disciplinary rule in widespread use throughout the Federal judiciary in such a manner as to obviate the everpresent danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit—clearly satisfies the first test. But beyond this, we submit that orders denying disqualification generally are important both in terms of their impact upon the losing party and because of the serious questions of public policy which they raise—questions which go to the very heart of the administration of justice, and of the public's perception of the process by which justice is administered.

While there are thus cogent reasons for treating the order in question as appealable, the concerns sometimes cited as supporting a contrary view will not bear analysis.

First of all, when measured in terms of relevant statistics (as opposed to untested assumptions), professed fears that appealability will subject the courts to a flood of appeals, generally unmeritorious, prove to be groundless. A notable example is the Second Circuit, where the misgivings cited by the majority of a divided court which recently opted for nonappealability do not appear to be supported by the available data. Thus, the actual number of appeals in that Circuit from orders denying disqualification appears far from overwhelming, while the respectable number of reversals tends

to negate any assumption that such appeals are particularly prone to be groundless. Moreover, to the extent data for comparison is available, the percentage of affirmances of orders denying and granting disqualification is by no means grossly dissimilar.

Equally groundless is the argument that to permit appeals from orders denying disqualification necessarily tends to delay the proceedings unduly. Actually, it cannot be assumed that the progress of the case will in fact be impeded by such an appeal. For example, in the present case, there has been no attempt to foreclose discovery pending a resolution of the disqualification issue. Nor would the mere taking of an appeal serve to stay proceedings in any event—a factor in itself likely to dissuade use of such appeals for purely dilatory purposes. And as the Court aptly noted in *Abney v. United States,* 431 U.S. 651, 663 (n.8) (1977), any problems of delay can be obviated by rules or policies affording expedited treatment, and use of summary procedures where appropriate.

Indeed, the trial court here found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation". (Emphasis added) (A. 160).

II.

Turning to the merits of the appeal, it is clear that the conflict disclosed by the present record requires that attorney Risjord be disqualified, and that the "consent" approach adopted below was inherently unsound.

In essence, the record reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company), which has disclaimed coverage of those claims under its policy on the basis of an "intentional tort" theory espoused by Risjord. The conflict inherent in Risjord's position clearly is detrimental both to Firestone and to the plaintiffs to whom Ris-

jord owed a duty of individed loyalty, inasmuch as Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage.

Notwithstanding the conflict of interests inherent in Risjord's position and the trial court's own finding that that conflict was likely to adversely affect Risjord's exercise of his independent judgment, the trial court held that Risjord might remain in the cases, notwithstanding Firestone's vehement objection, provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord Plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict).

In so holding, the trial court has misapplied a carefully drawn "consent" exception in the governing disciplinary rule (DR5-105), which rule generally precludes an attorney from accepting or continuing employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client". Clearly the "consent" exception in question is not designed to sanction "such delicate conflicting relationships and inescapable divided loyalties" as are here present (see *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968)), which inevitably preclude Risjord from exercising the independence of judgment which an attorney's duty of undivided loyalty demands. Even if Risjord's "intentional tort" theory were not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home.

Nor could a "consent" approach be viable here in any event unless it provided for the consent of *all* affected par-

ties, including Firestone. Certainly it is unrealistic to look solely to Home in this regard, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual role would itself be indicative of potential collusion, or at least that Home expected Risjord to be influenced by Home's interests.

Finally, the impracticability of a consent approach is pointed up by the manifest deficiencies in the "consents" Risjord purported to obtain.

In short, the temptation which Risjord inevitably confronts to cooperate and act in concert with his valued, long-standing client Home, in developing a strategy against Firestone, creates an inherently improper situation which can be remedied only by his disqualification.

ARGUMENT.

I.

AN ORDER DENYING A MOTION TO DISQUALIFY COUNSEL QUALIFIES FOR APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

Introductory.

There is a sharp division among the circuits as to the appealability of an order denying disqualification.

Half the circuits which have addressed the question have concluded that an order denying a motion to disqualify is appealable under 28 U.S.C. §1291 as a final (collateral) order, pursuant to the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Kroungold v. Triester*, 521 F.2d 763, 765 (3d Cir. 1975); *MacKethan v. Peat, Marwick, Mitchell & Co.*, 557 F.2d 395, 396 (4th Cir. 1977); *Uniweld Products, Inc. v. Union Carbide Corp.*, 385 F.2d 992, 994 (5th Cir. 1967); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1313 (7th Cir. 1978); *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975).

Half the circuits (including the court below) have concluded that such an order is not so appealable. See *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No.79-7042, June 1980) (en banc); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (D.C.Cir. 1976).

In the present case, the Court of Appeals for the Eighth Circuit, sitting *en banc*, overturned its own recent precedents (see, *e.g.*, *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977); *Meat Price Investigators Asso-*

ciation v. Spencer Foods, Inc., 572 F.2d 163, 164-65 (8th Cir. 1978); *Central Milk Products Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 1990 (8th Cir. 1978); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979))[14] and held that henceforth no such right of appeal will be recognized.

In the present portion of this Brief, we shall endeavor to demonstrate that the view favoring appealability is correct, both in terms of a proper application of the governing criteria laid down in *Cohen* (Point IA) and in terms of sound judicial policy. (Point IB).

A. An Order Denying a Motion to Disqualify Counsel Satisfies the Cohen Criteria for Finality.

In the seminal case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)[15], the Court recognizes that certain orders, collateral to the main action, should be deemed "final decisions" so as to qualify for appeal pursuant to 28 U.S.C. §1291.[16]

The Court in *Cohen* describes such appealable collateral orders as:

> "[Decisions] . . . which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated . . ." 337 U.S. at 546.

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[14]*Fred Weber* and *Dean Foods* were overruled expressly, the others by implication.

[15]*Cohen* involved an order denying a motion for security in a shareholder's derivative action.

[16]28 U.S.C. §1291 provides generally for appeals to the courts of appeals from "final decisions" of district courts.

While this Court properly has cautioned against overly rigid use of pat verbal formulae in this area (see *Eisen v. Carlisle & Jacquelin*, 417 U.S.156, 170 (1974)), the Court generally has stressed three elements as essential to appealability: (1) that the order be a conclusive determination of the question; (2) that the order involve a collateral matter rather than a mere step toward deciding the merits; and (3) that the order involve an important right which would be lost, probably irreparably, if appeal were deferred until there had been a final judgment on the merits. See *Abney v. United States*, 431 U.S. 651 (1977). Either in addition to or in conjunction with the foregoing elements, it has sometimes been suggested that account be taken of the importance of the order appealed from. See, *e.g.*, *Abney v. United States*, 431 U.S. 651 at 658 (1977) (order involving "an important right").

Clearly, the first two elements (*i.e.*, finality and separability) are satisfied as to orders denying disqualification. A degree of support for this view is at least implicit even in the decisions of those circuits which treat orders *denying* disqualification as non-appealable, insofar as those same circuits nevertheless treat orders *granting* disqualification as appealable. See., *e.g.*, the opinion of the Eighth Circuit in the present case (A. 202; 612 F.2d at 378). See also *General Electric Co. v. The Valeran Corp.*, 608 F.2d 265 (6th Cir. 1979). For example, it is difficult to conceive how disqualification proceedings can be viewed as "collateral" to the main action if the motion is granted yet fail to be so regarded if the motion is denied.

Turning next to the element of "urgency", the question arises: Is it practicable to defer review of a denial of disqualification until an appeal is taken from the judgment on

the merits? We believe there are cogent reasons for answering that question in the negative.

First of all, assuming (as we must for this purpose) that the challenge is well taken,[17] to proceed to judgment will have resulted in serious and irreparable harm which an ultimate reversal cannot fully vindicate. Beyond the obvious example of a needless expenditure of time and effort on proceedings which were tainted from the outset, there are additional aspects of irreparable injury which are even more germane in the present context.

One is the potential for incurable harm which may result from the underlying conflict—*e.g.*, the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty. As the court explains in *Greene v. Singer Co.*, 509 F.2d 750, 751 (3d Cir. 1971):

> "To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes. The precise question is whether the prohibitions imposed by the court order are sufficient to protect the interests of the defendant during the course of the trial. If, upon post-trial review, it were held that the safeguards imposed by this district court were too fragile to protect threatened interests, there could be damage inflicted upon the litigant for which the law would provide no practical remedy. Conversely, if the appeal goes forward now,

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[17]As appears from the statistics at page 23, that assumption is by no means unrealistic.

prior to trial, the possibility of irreparable injury would be substantially lessened."[18]

Equally irreparable will be the effect of such a tainted proceeding in frustrating public policy and in its impact upon the public's perception of the administration of justice. See *Tomlinson v. Florida Iron & Metal, Inc.*, 291 F.2d 333, 334 (5th Cir. 1961) (court, in reversing denial of disqualification, observes: ". . . Here, if the order was in error, the harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by any appeal taken after the trial, with Davis participating, is finally ended . . ."); See also *White Motor Corp. v. White Consolidated Industries, Inc.*, 60 Ohio App.2d 82, 395 N.E.2d 1340 (1978) (in holding an order denying disqualification appealable under state law,[19] court observes that construction in favor of appealability ". . . promotes the efficient administration of justice and serves the public policy embodied in the Canons of Ethics." 395 N.E.2d at 1345-1346).

Nor is it a real answer to these concerns to suggest (as does the court in *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022

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[18]This danger has been acknowledged by at least one court adhering to the view of non-appealability. See *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964) (clarified at 370 F.2d 418 (1966)) where the court, in granting a writ notwithstanding the court's view that an order denying disqualification was not appealable, observes: ". . . Continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation . . ." 338 F.2d 516 at 521-522.

[19]Admittedly the state law in question was dissimilar from 28 U.S.C. §1291, but the policy considerations noted appear relevant here.

(D.Col.Cir. 1976)[20]) that the aggrieved party resort to the vagaries of the All-Writs Statute (28 U.S.C. §1651) or the uncertain prospects of a possible permissive appeal under 28 U.S.C. §1292(b).[21] The continued vitality of the *Cohen* doctrine itself[22] bears witness to this Court's refusal to relegate the parties to such dubious alternatives where the *Cohen* rationale is satisfied. And neither of the suggested "alternatives" appears suited to the collateral order context. Thus the very fact that the order in question relates to a collateral matter (essential under *Cohen*) might lead the trial

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[20]The potentially illusory character of supposed alternative remedies in this context is illustrated by *Community Broadcasting* itself, where the appellate court refused even to consider them, explaining:

"We do not now consider Community's entitlement to relief under the alternative procedures proposed. No provision exists for certification of agency orders, and Community has emphatically advised the court that it does not seek a writ of mandamus. Moreover, the papers submitted to the court do not present sufficient factual material to enable us to determine whether to issue a writ of mandamus." 546 F.2d 1022 at 1028, note 40.

[21]Those uncertainties are illustrated in the meanderings of the Ninth Circuit. See, *e.g.*, *Trone v. Smith*, 553 F.2d 1207 (9th Cir. 1977), where the court holds that despite implications to the contrary in *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964) (clarified at 370 F.2d 418 (1966)), 28 U.S.C. §1292(b) is not a proper avenue for review of an order denying disqualification. See also *Greene v. Singer Co.*, 509 F.2d 750 (3d Cir. 1971) (appeal on collateral order theory accepted after appellate court previously had denied leave to appeal pursuant to §1292(b)).

[22]The *Cohen* doctrine has been described as manifesting a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . ." *Mathews v. Eldridge*, 424 U.S. 319, 331 (note 11) (1976). Insofar as the challenge to appealability here may really be directed to that "core principle", the following observation in Wright, Miller, Cooper, *Federal Practice and Procedure:* Jurisdiction §3911 (1976), at p. 500, seems apropos:

"There is no indication that proper collateral appeals have swamped the appellate courts, required duplicitous appellate review, or stultified the district courts. Neither is there any indication that improper attempts at collateral order appeal have proved a substantial burden. . . . Absent a sharp change in the course of events, the collateral order doctrine deserves to continue in substantially its present form . . ."

court to conclude that an appeal from it would not "materially advance the ultimate termination of the litigation". Nor would such orders necessarily be viewed as involving "a controlling question of law".[23] And consistent with the restrictions placed upon review by extraordinary writ (see, *e.g., Will v. United States*, 389 U.S. 90, 95 (1967) ("only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of [mandamus]")) it, too, is unsuited as a replacement for collateral order review. See Wright, Miller, Cooper, *Federal Practice and Procedure:* Jurisdiction §3911 (1976) at pp. 499, 500. And if the writ "remedy" is to be made palatable by expanding the permissible scope of mandamus, the "cure" is likely to pose many more problems than it solves, in that it would set the courts adrift without the *Cohen* guidelines. Beyond this, the suggestion of "alternatives" to §1291 tends to "put the cart before the horse", for if the finality test of §1291 is met, there is no occasion to consider such alternatives.

Moreover, deferral of appeal to final judgment on the merits cannot validly be justified on the theory that the appellate court can then assess the precise impact of any error in denying disqualification. As a practical matter, the extent to which the taint complained of has affected the proceedings is likely to be immeasurable. Cf. *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."). And insofar as the real object of deferral

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[23]28 U.S.C. §1292(b) requires, *inter alia*, that the district court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

may be to foreclose review by appealing to the natural tendency of the courts not to upset a case which has been fully tried, on the basis of intangibles the precise impact of which cannot readily be assessed, such an approach hardly can be viewed as affording the meaningful opportunity for review which the importance of the matter clearly warrants. See Note, 30 Vand.L.Rev. 259, 271-272 (1977): (''[I]t is unlikely that an objective determination of the ethical considerations will prevail on appeal from final judgment.'').

Turning next to the question of ''importance'', we believe it necessary to dispel at the outset the view sometimes voiced by the circuit courts that *Cohen* requires that the order appealed from be addressed to potentially decisive legal questions. See, *e.g.*, *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June 1980) (en banc). Recent definitive pronouncements by this Court lay down no such requirement. See, *e.g.*, *Abney v. United States*, 431 U.S. 651 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Nor has this Court refused to hold *Cohen* applicable merely because a class of orders may require resolution on a case-by-case basis. See *e.g.*, *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (challenge to bail as excessive). While a particular order may be deemed ''important'' because in making it the court is called upon to resolve a question of broad impact (see, *e.g.*, the *Cohen* case itself), one also may view a given class of orders as important simply because of their impact upon the losing party or because they are addressed to questions rooted in some significant public policy, or on both accounts. See, *e.g.*, *Abney v. United States*, 431 U.S. 651, 658 (1978) (''important right'').

As appears from the analysis at Point II of this Brief, the question posed by the motion for disqualification in the instant case—*i.e.*, the need to apply a disciplinary rule in

widespread use throughout the Federal judiciary[24] in such a manner as to obviate the everpresent danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit—would qualify as one of importance under the first standard. But we believe that the second standard (in both its aspects) is even more germane here, and that under it orders denying disqualification generally should be deemed important for this purpose.

That such an order has grave consequences for the losing party is amply illustrated by the present case, as is apparent from the analysis at Point II of this Brief. But the importance of such orders far transcends their impact on the immediate parties. The conflicts of interest which serve as the grist for motions to disqualify go to the very heart of the administration of justice, and of the public's perception of the process by which justice is administered, and reflect a vital need to preserve and strengthen public confidence in the Bar. So viewed, the rulings made on such motions are addressed to serious questions of public policy and as such hardly can be viewed as lacking in sufficient significance to warrant review. Indeed, it seems difficult to conceive of a rational system of justice under which rulings on motions for security are deemed deserving of immediate review, whereas a mo-

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[24]See 1 and 2 *Federal Local Court Rules* (Pike & Fischer, Inc., ed., Callaghan & Co. 1979), *passim*.

See, *e.g.*, M.D. Ala., Local Rule of Court Concerning Oath of Attorneys Upon Their Admission to Practice (adopting Canons of the ABA and Code of Ethics of the Alabama State Bar Association), 1 *Federal Local Rules* at Ala., p. 2a; N.D. Ill., Local Rule 6(a)(i) (attorney for admission must certify that he has read the Canons of Ethics of the ABA and "will faithfully adhere thereto"; Local Rule 8(3) (discipline of attorneys who fail "to abide by the provisions of the Canons of Ethics of the American Bar Association"), 1 *Federal Local Rules* at Ill., pp. 54-55.

tion to disqualify counsel for a conflict of interests which threatens to taint the entire proceedings is regarded as unworthy of prompt attention.

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy.

Consistent with the *Cohen* mandate that section 1291 be given a "practical rather than a technical construction" (337 U.S. at 546), we believe it appropriate to address additional policy considerations relevant to the question of appealability of orders of the type in question, by way of dispelling certain concerns which have been voiced in this area.

1. Professed Fears That Appealability Will Lead to Inundation of the Courts of Appeals Have Proven Groundless.

An argument sometimes urged in opposition to appealability of orders denying disqualification is that to permit such appeals would subject the courts of appeals to a flood of appellate litigation, generally unmeritorious. But the actual experience of the courts does not support this contention.

Initially, we invite the Court's attention to the following chart, tabulating all of the published opinions in the Second Circuit[25] involving appeals from orders granting or denying motions to disqualify counsel during the six-year period between that circuit's *en banc* adoption of a rule of appealability in *Silver Chrysler Plymouth, Inc. v. Chrysler*

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[25]The Second Circuit seems appropriate for this purpose inasmuch as its "experience" has been cited as typifying the supposedly horrendous consequences of appealability. See, *e.g.*, *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022, 1027 (D.Col.Cir. 1976), where the court states that ". . . the Second Circuit is now grappling with a deluge of interlocutory appeals . . ." and refers to a ". . . flood of interlocutory appeals . . ." in that circuit.

Motors Corp., 496 F.2d 800 (2d Cir.1974) and its recent *en banc* reversal of that rule in *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980).

Published Opinions In Second Circuit Between Silver Chrysler Plymouth (April 1974) and Armstrong (June 1980) Involving Appeals From Orders Granting or Denying Motions to Disqualify Counsel.

Orders Denying Disqualification[a]			Orders Granting Disqualification		
Number Affirmed	Number Reversed	Other Disposition	Number Affirmed	Number Reversed	Other Disposition
8[b]	3[c]	1[d]	5[e]	4[f]	1[g]

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[a] The present tabulation does not include *Lefraks v. Arabian American Oil Co.*, 527 F.2d 1136 (2d Cir. 1975), involving alleged improper solicitation of clients, a situation extraneous to the question with which we are concerned.

[b] *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980) (*en banc*).

In re Hartford Textile Corp., 588 F.2d 872, 876 (2d Cir. 1978).

Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977).

Securities and Exchange Commission v. Sloan, 535 F.2d 679 (2d Cir. 1976).

W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976).

Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975).

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975).

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

[c] *Bohack Corp. v. Gulf & Western Industries, Inc.*, 607 F.2d 258 (2d Cir. 1979).

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

[d] *J. P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975) (remanded for further proceedings).

[e] *United States v. Ostrer*, 597 F.2d 337 (2d Cir. 1979).

Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978).

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975).

NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976).

[f] *Board of Education of the City of New York v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975). (*International Electronics* is included in both the "granted" and "denied" categories as it involved motions to disqualify both counsel.)

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974).

[g] *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977) (order reversed and remanded as premature).

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The above figures are significant in several respects.

First, the actual number of appeals (involving published opinions) from orders denying disqualification (some 11 over a period of 6 years) is by no means overwhelming. See also dissenting opinion in *Armstrong v. McAlpin*, ... F.2d .... (2d Cir. No. 79-7042, June, 1980) (*en banc*) at page 2. Nor does it appear that the addition of dispositions not involving published opinions (for which no comprehensive data are readily available) would significantly alter the magnitude of these figures. Thus, in *Armstrong*, the court cites only three such appeals for 1978,[26] a figure which hardly suggest that the court is being deluged with such matters.

Secondly, a comparison of appeals from orders *denying* disqualification with appeals from orders *granting* disqualification (as to which the propriety of appeal is generally conceded) is particularly revealing. Thus the number of cases in each group (involving published opinions) is approximately the same, while the percentage of cases in which the lower court's determination was affirmed (*i.e.*, 67% where the trial court denied disqualification and 50% where the trial court granted disqualification) is not grossly dissimilar. And while the addition of appeals disposed of

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[26]According to the court, of the three cited appeals, one was withdrawn and in the other two the order below was affirmed. See *Armstrong*, p. 10, note 9.

without published opinions in the respective categories (for which the relevant statistics are not readily available) would, of course, alter the precise numbers,[27] there is no evidence that that addition would greatly alter the comparative results cited.

At the very least, the above figures tend to dispel any preconceived notion that appeals from orders denying disqualification may be presumed to be frivolous. They likewise argue against any rational distinction (in terms of appealability) between orders denying disqualification and those granting disqualification.[28] Apart from the illogic of that distinction, we submit it is inherently unfair, in that by affording meaningful redress only where disqualification is granted, it inevitably tilts the scales of justice in favor of the party opposing disqualification.

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[27]See page 24, note 26.

[28]The arguments sometimes advanced to support the distinction are readily answered:

1. While an order granting disqualification is said to disrupt the litigation, permitting an appeal from that order does not really obviate the supposed disruption. Nor is such disruption any less serious than the potential taint of the proceedings which may follow a denial of disqualification.

2. The improper granting of disqualification is said to sully the reputation of the affected counsel; but an improper denial sullies the administration of justice, hardly a matter of less moment. Indeed, it would be difficult to persuade the public of the merit of a legal system which is careful to afford prompt redress for injuries to attorney reputations but does not afford equally prompt relief for clients threatened with a breach of loyalty or breach of confidence.

3. Any contention that an improper denial of disqualification has no permanent effect ignores the considerations discussed above regarding the "urgency" factor.

4. The suggestion that the granting of the order is some evidence of merit represents a logical fallacy. The relative merit with which we are here concerned pertains to the *appeal*, not the *original motion*. Assuming, *arguendo*, the granting of the motion may indicate the *motion* was well taken, it does not support an inference that the *appeal* from that grant is well taken so as to support especially favorable treatment for such an appeal.

5. Insofar as it may be contended that the losing party may not be able to establish that disqualification affected the result, the same is true of a failure to disqualify.

2. Appealability Will Tend to Further, Not Frustrate, the Interests of Efficient Judicial Administration.

Viewed in terms of efficient judicial administration, sound policy would dictate that a potentially tainted proceeding be "nipped in the bud". See *White Motor Corp. v. White Consolidated Industries, Inc.*, 60 Ohio App.2d 82, 395 N.E.2d 1340, 1346 (1978) (". . . providing for an appeal on the issue of disqualification of counsel may effect a savings of judicial time in that a cause, otherwise properly tried below, need not be retried should an appellate court determine that the failure to disqualify counsel was reversible error."). Nor is there real merit in the argument that to permit appeals from orders denying disqualification necessarily tends to unduly delay the proceedings. See *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (D.Col.Cir. 1976). In fact, the gratuitous assumptions upon which that argument is premised will not bear analysis.

First of all, it cannot be assumed (as the argument in question implies) that the progress of the case will in fact be impeded by such an appeal. For example, in the present case, there has been no attempt to foreclose discovery pending a resolution of the disqualification issue. Nor would the mere taking of an appeal serve to stay proceedings in any event—a factor in itself likely to dissuade use of such appeals for purely dilatory purposes. And should special circumstances warrant that a stay be granted in a particular case, the appellate process can be expedited accordingly. See, *e.g.*, *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975) (matter briefed and argued on expedited basis).

Secondly, the time required for such appeals need not be inordinate, as the present case (in which the total time expiring between the filing of the notice of appeal and the

submission of the reply brief in the Court of Appeals was a mere 3 months) amply attests. Indeed, the trial court here found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation" (Emphasis added). (A. 160).

Finally, if in a given case it should appear that an appeal is frivolous, appropriate sanctions can be invoked. See 28 U.S.C. §§1912, 1927, Fed. Rules. App. Proc., Rule 38. See *e.g., Church of Scientology of California v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980).

Apropos here is this Court's observation in rejecting a similar argument against applying the *Cohen* doctrine to appeals from pretrial orders denying motions to dismiss indictments on double jeopardy grounds:

> "[W]e believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." (*Abney v. United States*, 431 U.S. 651, 663 (n.8) (1977).

C. The Rationale of Armstrong v. McAlpin is Unsound.

We will not burden this Court with a case-by-case analysis of the various circuit court opinions which have opted for or against appealability. We do believe it appropriate, however, to address the recent *en banc* opinion of the Second Circuit in *Armstrong v. McAlpin*, ... F.2d .... (No. 79-7042, June 20, 1980),[29] where, in the latest stage of what

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[29]The *Armstrong* opinion (published after the Court's grant of *certiorari* here) states that it is designed to make known the circuit's current view. (*Armstrong*, p. 13, note 14). (References to *Armstrong* (not yet published), cited *Armstrong*, p. ...., are to the opinion as filed.)

the dissent characterized as a process of tergiversation,[30] the court overruled its prior *en banc* opinion in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) and held that orders denying disqualification were not appealable under 28 U.S.C. §1291.

Before assessing the reasoning of *Armstrong*, three preliminary observations regarding that case are in order. First, true to the adage that "hard cases make bad law", the majority appears to have been influenced by its perception of the merits of the underlying case, which it viewed as "charging serious abuses of the securities laws" (*Armstrong*, p. 10) and as involving "the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public" (*Armstrong*, p. 24).

Secondly, the court in *Armstrong* appears to ground much of its reasoning[31] on the views expressed in a student Com-

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[30]The dissent notes that since 1956 (when a panel majority (Judges Swan and Learned Hand) in *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956) held *Cohen* applicable to denials of disqualification) the Second Circuit now has reversed its position three times. See, in addition to *Silver Chrysler Plymouth* and *Armstrong*, *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir. 1959).

[31]The majority also cites the views expressed in Professor Moore's treatise on *Federal Practice*—views possibly colored by the author's general belief that the *Cohen* doctrine itself is largely obsolete (Moore at §110.10). The latter belief obviously is not shared by this Court (see, *e.g.*, *Abney v. United States*, 431 U.S. 651 (1977); *Eisen v. Carlisle & Jacquelin*, 427 U.S. 156 (1974)) or by the authors of another well-known treatise in the field. See *Wright, Miller, Cooper, Federal Practice and Procedure:* Jurisdiction §3911 (1976) at p. 500 (quoted at p. 17, note 22 of this Brief).

ment[32] at 45 U.Chi.L.Rev. 450 (1978))[33] in which the author premises his criticism of appealability largely on the charge—for which no persuasive evidence is cited[34]—that the motions for disqualification from which such appeals are taken generally are mere instruments of what the author perceives as "harassment" (45 U.Chi.L.Rev. at 450)—an

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[32]The views expounded in that student Comment are not shared by all student authors. Thus a Note at 11 Ga.L.Rev. 705 (1977), criticizing the non-appealability holding of *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (D.Col.Cir. 1976), observes:

> "In such a flexible area the court seems to have abdicated its responsibility by drawing the line so that no appeal will lie. The court ignored the fact that disqualification proceedings are different from other interlocutory orders because of the important public interest at stake, particularly when a former government official is involved. While it is true that the trial court has broad discretion in ruling on these orders and that the court of appeals should not become the 'overseer of the ethics of the members of the legal profession,' the court does have responsibility for imposing ethical restraints on lawyers—particularly on those who were formerly in government services—that will restore public confidence in the legal system. In view of the *cozy* relationship between former government attorneys and large law firms, failure to adjudicate the attorney's disqualification immediately and finally will diminish public confidence in the attorney-client relationship. Allowing even the appearance of impropriety to pervade an entire proceeding will undermine the public's faith in the judicial process. If public confidence in the judicial system is as important as it has been declared to be by courts that have ruled on the merits of disqualification, final resolution of these issues demands immediate review." (footnotes omitted) (11 Ga.L.Rev. at 713-714)

See also Note, 30 Vand.L.Rev. 259, 273 (1977) (also criticizing non-appealability holding of *Community Broadcasting*): ("Since orders denying disqualification of counsel can harm the litigant irreparably and taint the merits of the action, the court has a responsibility to avoid these consequences by granting immediate appeal to such orders.")

[33]The *Comment*, entitled "The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts", is referred to in *Armstrong* (and, for convenience, here also) as the "Chicago Note".

[34]The author's conclusory assertion that denials of disqualification rarely are reversed is not borne out by the statistics cited at page 23 of this Brief.

assumption at odds with the data described at page 23 of this Brief.[35]

Third, the court in *Armstrong* purports to distinguish between orders denying and granting disqualification, viewing the latter as still appealable under *Cohen*, although admittedly troubled by the logic of the distinction. (See *Armstrong*, p. 14, note 15).[36] In support of this distinction, the court cites a series of familiar arguments, the general nature and fallacy of which have been discussed at page 25, note 28 of this Brief and need not be repeated here.[37]

Turning to the rationale of *Armstrong*, the majority suggest that an order denying disqualification (while concededly collateral (*Armstrong*, p. 10)) is not appealable under *Cohen* in that: (1) it does not meet the test of urgency; *i.e.*, any error is correctable on a post-judgment appeal; and (2) it does not meet a supposed *Cohen* test of importance, which

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[35]While much of the dispute on the merits in *Armstrong* centers on the applicable standard, the fact that the original panel held for disqualification (see *Armstrong v. McAlpin*, 606 F.2d 28 (2d Cir.1979)) and one of its members still dissents, would tend to dispel any suggestion the appeal was frivolous. Indeed, the lengthy list of amici and the appellate court's own reference to the issue as important would themselves tend to negate any such notion.

[36]*E.g.*, the court's suggested test of "importance" (*i.e.*, as involving questions of law versus fact) would not support appeals from orders granting disqualification.

[37]In addition to the more familiar arguments, the court in *Armstrong* suggests (p. 15) that financial inability to replace counsel may terminate the litigation—an echo of the now discredited "death knell" doctrine. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

the *Armstrong* court perceives as at least generally requiring potentially decisive legal (as opposed to factual) questions.[38]

Upon analysis, neither ground is sound. As previously noted (Point IA), a post-judgment appeal simply cannot undo the personal and public harm which flow from an unredressed conflict. And while we believe that the order in the present case would qualify even under the *Armstrong* test of importance (in that the issue involves a broad general principle to be resolved on essentially undisputed facts), we submit that the test itself (urged by the author of the Chicago Note) is fallacious in that it runs counter to this Court's pronouncements and holdings on the subject. (See page 19, *supra*).[39]

Equally unsound are the *Armstrong* court's perceptions of the underlying policy considerations. The court expresses

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[38]The court suggests two analogies, neither of which is apt:

1. Discovery orders, which are distinguishable on several grounds: *E.g.*, (a) they do not give rise to the ethical concerns, and related questions of private injury and public policy, which are posed by attorney conflicts of interest; (b) the party ordered to furnish discovery has control over compliance and may test the order by contempt, a choice not available in the disqualification context; and (c) the volume of the two categories of orders obviously is not similar.

2. Orders involving challenges to a trial judge, which again are readily distinguishable: *E.g.*, they do not pose questions of breach of loyalty or breach of confidence but merely of a possible erroneous decision; hence they do not so clearly satisfy the *Cohen* tests of separability and urgency. Moreover, any claimed discrepancy in treatment may infer that *Cohen* should be applied in the trial judge context (a question we need not address here) rather than that it should not be applied in the present context.

Moreover, if the discovery or trial judge analogy were deemed apt, why is appeal to be allowed where disqualification is granted?

[39]The *Armstrong* majority suggests that the cases in which this Court did not follow the "fact" versus "law" dichotomy urged in *Armstrong* involved threatened destruction of very important rights. Unfortunately, the *Armstrong* majority fails to recognize that the rights vindicated in disqualification motions also are very important.

concern at assumed delays[40] stemming from appealability.[41] But as previously noted (see page 26), that assumption not only is unwarranted but also fails to give proper weight to the court's power to devise ample procedural safeguards to forestall any such possibility without depriving the aggrieved party of any meaningful redress. Even if there were substantial evidence of potential abuse,[42] *Abney v. United States*, 431 U.S. 651, 662 (note 8) (1977) teaches that the proper remedy would be not to decline appealability but to employ suitable procedures from the court's broad arsenal to curtail such abuse. And insofar as the court professes concern over the possible volume of such appeals, it fails to muster any persuasive factual support, let alone to take account of the possible procedural devices suggested by this Court in *Abney* for curbing any real abuse if it should arise.[43]

Nor is there merit to the court's suggestion (a restatement of views expressed in the Chicago Note) that §1292(b)[44] or §1651 provides a suitable alternative where disqualification is denied (although the court does not so relegate the loser

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[40]A typical fallacy in the Chicago Note is the author's assumption that an appeal under 28 U.S.C. §1291 (unlike an appeal under §1292(b)) necessarily will stay the proceeding below. See 45 U.Chi.L.Rev. at 472.

[41]While the court in *Armstrong* states that the suit there was frozen for a substantial period, it acknowledges that a portion of this time was due to successive panel and *en banc* consideration (with successive opinions in September, 1979 and June, 1980) and does not mention the possibility that an expedited appeal might have been helpful.

[42]Where disqualification is ordered, any delay would appear more plausibly chargeable to the offending attorney, not the moving party.

[43]As for the *Armstrong* court's reference to an "impression" that such motions have increased (*Armstrong*, p. 10), apart from its vagueness, there is an obvious distinction between the quantity of trial court motions and the quantity of appeals. Clearly there is no indication that the latter is of great magnitude.

[44]The Chicago Note itself concedes that the criteria of §1292(b) would not apply to most orders denying disqualification. (45 U.Chi.L.Rev. at 471).

if disqualification is granted). The fallacies in that argument have been adverted to previously (page 16, *supra*), and need not be repeated here.

Finally, we submit that *Armstong* itself indirectly points up the need for appealability, insofar as the appellate court there, in addressing the merits, notes the need for guidance so that the trial courts will not be "cut . . . adrift", in light of a projected future in which the court foresees its rule of non-appealability as affording less opportunity for guidance. (*Armstrong*, p. 15). Indeed, it seems ironic that the court should have adopted a rule of non-appealability in a case (involving what the circuit court refers to as an important issue pertaining to disqualification of former government counsel), which seems to point up the very need for appeal which the court purports to foreclose.

II.

THE CONFLICT DISCLOSED BY THE PRESENT RECORD REQUIRES THAT ATTORNEY RISJORD BE DISQUALIFIED.

A. The "Consent" Approach Adopted Below Was Inherently Unsound.

The record below reflects (essentially without contradiction) that attorney John Risjord and his firm, who represent the plaintiffs in certain product liability (wheel and rim) cases against Firestone, also have a long-standing relationship as attorneys for Firestone's product liability insurer (The Home Insurance Company) which the Risjord firm holds out as its foremost insurance client[45] (A. 12, 50, 62,

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[45]See, *e.g.*, Addendum A to this Brief, following page 45.

90-91, 98-99, 100-102, 105-106, 111, 134, 157-158.)[46] Based on an "intentional tort" theory espoused by Risjord (A. 12, 50, 62), Home disclaimed coverage under its policy (A. 113, 115; see also A. 197, 198). Firestone, voicing concern that Risjord's management of the cases inevitably would be colored (consciously or unconsciously) by his awareness of Home's interest (as insurer of those very claims) in defeating coverage, moved to disqualify Risjord, noting that the conflict inherent in Risjord's position was detrimental both to Firestone and the plaintiffs to whom Risjord owed a duty of undivided loyalty.

The trial court, while finding that the resulting conflict was likely to adversely affect Risjord's exercise of his independent judgment (A. 160), nevertheless held that Risjord might remain in the cases provided he obtained the consent of Home (which stood to benefit by the very conflict complained of) and the Risjord Plaintiffs (who were hardly of sufficient sophistication to appreciate the conflict) (A. 160, 165-166), irrespective of any objection interposed by Firestone. The Court of Appeals, without addressing the facts (essentially undisputed) in any meaningful detail, purported to uph' 'd the trial court's action as a permissible exercise of discr on (A. 203).

Actually, the trial court's action represents a misapplication of the disciplinary rule (Disciplinary Rule ("DR")

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[46]While the trial court found that the Risjord firm was not on a formal retainer fee arrangement with Home (A. 157), that fact is irrelevant in the present context. (See, *e.g.*, *I.B.M. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978).)

5-105[47], derived from the Code of Professional Responsibility of the American Bar Association (''ABA Code'')) which the trial court purported to apply.

In essence, DR5-105 precludes an attorney from accepting or continuing employment ''if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client,'' (except to the limited extent permitted under the consent provisions of DR5-105(C)). The Rule is in furtherance of the policy articulated in Canon 5 of the ABA Code, that ''a lawyer should exercise independent professional judgment on behalf of a client'', and the mandate of Canon 9 that ''a lawyer should avoid even the appearance of professional impropriety''.

The Rule contains a carefully drawn exception whereby informed consent by all affected interests may obviate a conflict where it is ''obvious'' that the challenged attorney

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[47]DR5-105 (*i.e.*, the Missouri version (adopted in the Western District), which omitted some additional language found in the ABA Code) provides:

''(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.''

can adequately represent the various interests involved and all affected interests join in the consent. DR5-105(C). The trial court purported to apply that exception as a basis for permitting Risjord to continue in the cases in question. But such a consent approach was not viable in the present context, since the "consent" exception is not designed to sanction situations involving "such delicate conflicting relationships and inescapable divided loyalties" as are here present. As noted in *Matter of Kelly v. Greason*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) (from which the quoted phrases are taken), in such cases "the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct will be unavoidable [citing cases]. Moreover, the unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him (*Matter of Young*, 188 App.Div. 538, 542-544, 177 N.Y.S. 259, 261-63)." Cf. *Sapienza v. New York News, Inc.*, 481 F.Supp. 676 (S.D.N.Y. 1979) (Attorney representing plaintiffs and defendant A successfully challenged by defendant B despite consent of plaintiffs and A).

Nor could any viable "consent" approach be taken in any event without providing for the consent of *all* affected parties, including Firestone. Pertinent here is the following observation in *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976): "*Putting it as mildly as we can*, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge *and* consent of *all* concerned." (Emphasis added). 528 F.2d 1384, 1386 (2d Cir. 1976). Even assuming, *arguendo*, that Home and the individual plaintiffs consented, Firestone has *not* consented. Therefore, Risjord has

not secured and cannot possibly secure the "consent of *all* concerned".

By disregarding these principles, the lower courts have in effect used the "consent" provision of DR5-105(C) to emasculate the main thrust of DR5-105 and the fundamental ethical principles it embodies. While the adverse effects of that emasculation far transcend the insurance context, their destructive effect in the insurance context is itself cause for general concern, as the present case amply demonstrates.

It is inherently impossible for one in Risjord's position to exercise the independence of judgment which an attorney's duty of undivided loyalty demands. Risjord's tactical and strategic choices in prosecuting the claims of the Risjord Plaintiffs (*e.g.*, in deciding whether and if so how aggressively to pursue his "intentional tort" theory) cannot be divorced from his awareness that his actions may impinge on the success or failure of his long-standing client, Home, in avoiding liability under the Firestone policy.

Even if Risjord's "intentional tort" theory was not consciously conceived with Home's interests in mind, in determining whether and to what extent to pursue it, his independence of judgment must inevitably be clouded by his awareness that such a theory is helpful (and its abandonment harmful) to his client Home. In the face of that awareness, Risjord cannot assess the tactical and strategic "pros" and "cons" of such a theory (*e.g.*, whether it may appear so far-fetched as to weaken the balance of the Risjord Plaintiffs' cases in the eyes of the jury) with the degree of independence which his duty of undivided loyalty demands. *A fortiori*, how can it be said that Risjord's conduct has not created an "appearance of impropriety" which can be dispelled only by his disqualification?[48]

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[48]See, *e.g.*, the role of Risjord in the *Rodriguez* case, discussed at note 8 p. 4, *supra*.

Nor are the concerns voiced by Firestone novel or unique. The courts have taken note of the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit. See, *e.g.*, *Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 647, 39 Cal.Rptr. 731, 394 P.2d 571 (1964) ("in cases involving multiple claims against the insured, some of which fall within the policy coverage and some of which do not, the insurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely upon the insured". (footnote omitted)). See also *Comment: The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 Univ.Pa.L. Rev. 734, 736 (1966), noting "the insurer's natural tendency to confine the third party's action to claims outside of coverage as soon as possible, even at the expense of the insured's interest."

While *Tomerlin* involved an insurer-linked attorney engaged to represent an insured defendant, the danger is no less real when such counsel purport to represent a plaintiff. Indeed, the risks are compounded, due to the greater control exercised by plaintiff's counsel over the theory of the action, the fact that *two* interests (*i.e.*, the plaintiff and the defendant-insured) are placed in jeopardy, and the increased difficulty of assessing the attorney's motives in a context where breaches of loyalty are less likely to be flagrantly apparent. Indeed, the impossibility of detecting and policing the possible impact of the insurer's interests on subtle nuances of tactics and strategy renders the danger particularly serious in the plaintiff-attorney context. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (". . . to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.").

Moreover, in light of Home's fiduciary obligations to Firestone and Firestone's vital stake in the actual and potential consequences of the conflict, a "consent" approach which ignores Firestone's interests is not viable. At the very least, Firestone's consent or permission should be required as a precondition to any consent by Home, having in mind the risk that Home, notwithstanding its fiduciary duty not to take or permit any action respecting the conflict or its resolution which is or may appear to be detrimental to Firestone's interests, might choose to gamble on the conflict in the hope of benefiting at Firestone's expense. Indeed, Home's very willingness to consent to Risjord's dual role would itself be indicative of potential collusion, or at least that Home expected Risjord to be influenced by Home's interests.

Under these circumstances, the mere "consents" of Home and Risjord's personal injury plaintiffs could not dispel the "appearance of impropriety" stemming from Risjord's dual role. On the contrary, Home's consistent effort to keep Risjord in the case as its ostensible opponent is itself cause for concern.

Nor can Risjord's retention be justified in terms of a concern for the interests of the plaintiffs he presently represents. To the extent any avenues presently pursued by Risjord may have sufficient merit to warrant pursuit in plaintiffs' interest, they can be pursued at least as effectively by counsel free of the differing interests which may color or appear to color, and thereby inevitably will taint, Risjord's actions. And to the degree, if any, that the evidence, viewed in a light uncolored by coverage considerations, were to warrant pursuit of an intentional tort theory, such counsel would be free to pursue it. In fact, they would have even greater freedom of action in that regard, since they would be untroubled by concerns that their motives might be sus-

pect. At the same time, Risjord's replacement with truly independent plaintiffs' counsel will further the paramount goal of preserving public confidence in the administration of justice.

B. The Purported "Consents" Filed by Risjord Could Not Obviate the Need for Disqualification in Any Event.

While a "consent" approach would not be workable here in any event for the reasons noted at Point IIA, brief mention should be made of the deficiencies in the consents Risjord purported to obtain—deficiencies which not only are of significance in their own right but which also point up the impracticability of the trial court's purported "solution."

Turning first to the tenor of the "consents" themselves, it should be noted that neither Home nor the Risjord Plaintiffs has consented to the *dual* representation. At most, Home merely "consents" to the Risjord firm's continued representation of *Home*, while the Risjord Plaintiffs merely "consent" to the Risjord firm's representation of the *Risjord Plaintiffs* (A. 167). Thus, the Home "consent" is framed as follows: "[T]he Home Insurance Company hereby consents to the continued representation of Niewald, Risjord & Waldeck of the Home Insurance Company *in the case of Cannova Enterprises*, Inc., d/b/a Mr. C's 103 vs. Home Insurance Company, et al." (A. 171) (Emphasis added). Home does not even purport to consent to Risjord and his firm representing the *Risjord Plaintiffs*. Absent such consent, the requirements of DR5-105(C) cannot be deemed satisfied in any event.

Turning first to the pertinent language of DR5-105(C):

> "A lawyer may *represent multiple clients* . . . if each consents to *the representation* after full disclosure of the possible effect of *such representation* on the

> exercise of his independent professional judgment on behalf of each.'' (Emphasis added).

The quoted language clearly contemplates that each client consent not merely to continued representation of himself but to the continued representation of the adverse party as well.

Also pertinent here is the following language from *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976): ''Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit *against his own client* without the knowledge and consent of all concerned.'' (Emphasis added). In terms of the present case, Home's ''consent'' would have to include, *inter alia*, consent to the Risjord Firm representing the Risjord Plaintiffs in suits *against Home's insured*, Firestone. Yet Home's consent does not even purport to do so.

Over and beyond the deficiencies stemming from the tenor of the ''consents'' is a further inadequacy, *i.e.*, a failure to satisfy the requirement of DR5-105(C) that consent be obtained from those affected after ''full disclosure of the possible effect of such representation on the exercise of [the attorney's] independent professional judgment on behalf of each''.

The requisite standard of disclosure is an exacting one. See, *e.g.*, *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978):

> ''Clearly, full and effective disclosure of all the relevant facts must be made and *brought home* to the prospective client.'' 579 F.2d at 282 (footnote omitted, quoting Justice Story in *Williams v. Reed*, 3 Mason 405, 418, Fed. Cas. No. 17,733 (C.C. Maine 1824) (Emphasis added).

Risjord's Report (A. 167) falls far short of that standard. Risjord's own affidavit lacks any specificity and offers only

vague generalities, as do the "consents and approvals" of referring counsel of the Risjord Plaintiffs. The "consents" of the Risjord Plaintiffs are likewise unilluminating, except insofar as they point up their inadequacies. In essence, each of the Risjord Plaintiffs signed a "pro forma" affidavit, reciting that Risjord represented Home in a case involving fire insurance and that Home (which is listed as a representative client in Martindale-Hubbell) is a client of the Risjord firm "on a case-by-case basis . . ."; that Home does or may have an interest as excess liability insurer in their cases against Firestone; and that "[w]ith full knowledge of the relationship of the Niewald, Risjord & Waldeck law firm to the Home Insurance Company and its affiliates, the undersigned plaintiff consents and agrees to the continued representation by Niewald, Risjord & Waldeck of the undersigned claim against" Firestone. Rather than bringing home to his clients the real nature and significance of the conflicts and their consequences, as contemplated by the full disclosure rule, Risjord appears to be "playing down" and attempting to justify his continued representation of conflicting interests—*e.g.*, by focusing on such self-serving irrelevancies as the difference in subject matter between the Risjord Plaintiffs' cases and a case in which Risjord represented Home, and Risjord's claim that he has no formal retainer arrangement with Home but takes matters on a case-by-case basis. There is no evidence in any of these affidavits that any of these lay persons were told what Firestone has charged or what the trial court has found—*e.g.*, of Firestone's concern over the danger that Risjord's independent judgment may be impaired by a conscious or unconscious desire to aid Home vis-a-vis Firestone. Indeed, there is no showing that any *meaningful factual disclosure* was made to the Risjord Plaintiffs.

Viewed in the context in which the "consents" were obtained, these deficiencies appear symptomatic of an even more fundamental reason for finding the "consent" ap-

proach inapposite in the present context—*i.e.*, the unlikelihood that persons of relatively limited sophistication in legal matters could fully appreciate the subtle risks to which Risjord's dual representation subjects them.

C. Home's Efforts to Preserve Risjord's Status as Counsel for Plaintiffs Reinforce the Concerns Inherent in the Basic Conflict.

While the concerns inherent in the basic conflict in which Risjord finds himself are themselves ample to justify the relief sought by Firestone, those concerns are reinforced by what appears to be a dominant theme in these proceedings—*i.e.*, Home's persistent efforts to preserve Risjord's status as counsel for plaintiffs.

Indeed, the unusual ardor with which Home consistently seeks to aid Risjord's cause in these proceedings is itself ground for concern, given Home's awareness that the strategy and tactics employed by Risjord may affect the outcome of Home's efforts to avoid coverage of the Risjord Plaintiffs' claims under the Firestone policy.

Thus, Home's "consent" to Risjord's representation of Home in *Cannova* contains gratuitous statements which appear calculated to argue Risjord's case in seeking to avoid disqualification: *e.g.*, by seeking to "play down" Risjord's relationship to Home and disclaiming Risjord's receipt of Firestone data from Home (A. 170).

Again, Home's letter of November 6, 1979, purporting to urge Risjord's withdrawal from *Cannova*, is laced with statements which appear calculated to serve no purpose except to argue Risjord's case in resisting disqualification: *e.g.*, it seeks to minimize the role of Risjord as Home's attorney in *Cannova* (A. 191) and gratuitously seconds Risjord's contention that Home has not supplied Risjord with data it obtained as Firestone's insurer (A. 192). If drafted

by Risjord, Home's inclusion of such statements is indicative of collusion; if drafted independently by Home, it reflects a desire to secure Risjord's continued representation of the Risjord Plaintiffs, a desire which is itself highly suspect. Here, again, the very vehemence with which Home indirectly endorses Risjord's position itself creates an appearance of impropriety which only the disqualification sought by Firestone can dispel.

While admittedly less clear-cut than the examples previously cited, mention should be made of one further instance in which Home's actions tended to support Risjord's efforts to avoid disqualification. Shortly after Risjord, in the course of his deposition, erroneously suggested that Firestone was insured not by Home Insurance Company but by Home Indemnity Company (A. 90-91) (a related entity), a member of Home's staff suddenly departed from past practice by writing to Firestone for the first time on the letterhead of Home Indemnity Company (A. 145). This remarkable coalescence has never been explained.

Two facts emerge from this series of events which tend to reinforce the concerns which prompted Firestone's initial Motion for Disqualification:

1. Home appears determined to have Risjord as its ostensible adversary; and

2. Home and Risjord appear to be acting in tandem to that end.

The coalescence of actions between Home and Risjord also points up a further danger stemming from Risjord's dual relationship with Home and the Risjord Plaintiffs: *i.e.*, the possibility that Home might divulge to Risjord information which Home elicits in confidence from its insured, Firestone, in furtherance of Risjord's "intentional tort" theory and Home's companion effort to avoid coverage under

the policy (A. 112). The integrity of the judicial process requires that any such temptation to concerted action in breach of Home's fiduciary obligations to Firestone be removed by precluding the dual representation which creates that temptation.

Conclusion.

Upon analysis, the rule adopted by those circuits allowing appeals from orders denying disqualification of counsel is seen to be fully consistent with the doctrine of *Cohen v. Beneficial Industrial Loan Corp.* and with sound judicial policy.

The present case itself attests to the need for such a rule, inasmuch as the trial court failed to redress effectively a patent conflict. As appears from the above analysis, that conflict can be obviated and the underlying public policy considerations vindicated only by granting Firestone's motion for Risjord's disqualification.

Respectfully submitted,

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ADDENDUM A.

Illustrative "Card" of Risjord Firm in Martindale-Hubbell Law Directory (A. 100).

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General Civil, Trial and
Appellate Practice
Corporation, Insurance,
Probate, Tax and
Estate Planning Law

(ATTORNEY BIOGRAPHIES OMITTED)

REPRESENTATIVE GENERAL CLIENTS: Southwest Grease & Oil Co.; Builders Hardware and Appliance Co.; City Volkswagen, Kansas City, Kansas; Jenkins & Blaine Construction Co., Kansas City, Missouri; Johnnie Walker Medical Electronics, Inc.; Raytown, Missouri; Merriam Volkswagen, Merriam, Kansas.

REPRESENTATIVE INSURANCE CLIENTS: The Home Insurance Co.; Crum & Forster Group; Republic-Vanguard Insurance Cos.; Great American Insurance Co.; Royal-Globe Insurance Group; The Hanover Insurance Group; Firemens Fund-American Insurance Group; Consolidated Mutual of Brooklyn, New York; Grain Dealers Mutual Insurance Co.; Insurance Company of North America; Mill Mutuals: Millers Mutual of Alton, Illinois; New Hampshire Insurance Co.; Northwestern National Insurance Co.; State Farm Fire Insurance Co.; Commercial Union and North British Group; Sentry-Hardware Group; American States Insurance Co.; Hartford Fire Insurance Co.; Continental

National American Group; Chubb/Pacific Indemnity Group; The Aetna Insurance Co., Shawnee Mission, Kansas; Aetna Life and Casualty Co., Kansas City, Missouri; A.F.I.A. World Wide Insurance, New York, N.Y.; Atlantic Cos., Kansas City, Missouri, Cravens, Dargen & Co., Special Risks, Houston, Texas; Holiday Inns of America, Memphis, Tennessee; Industrial Indemnity Co., Dallas, Texas; Market Facilities, Inc., Los Angeles, California; Safeway Stores, Kansas City, Missouri; Skaggs Drug Co., Salt Lake City, Utah; State Security Insurance Co., Edwardsville, Illinois; Utica Mutual Insurance Co., Utica, New York; Western Casualty & Surety Co., Kansas City, Missouri.

REFERENCE: Commerce Bank of Kansas City, N.A.